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No. 09-207

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

J.R.Y., individually and as the administrator of the estate of his minor son, B.M.Y.; and T.S.Y., mother of B.M.Y.,

Petitioners,

v.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Woodmen of the World Life Insurance Society has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The Petition for Writ of Certiorari ("Petition") should be denied because it presents no issue worthy of the Court's attention. In an unpublished opinion, the United States Court of Appeals for the Fifth Circuit held Petitioners' negligence claims against Respondent fell within the broad scope of the parties' arbitration agreement, and, although Petitioners had waived the argument, the Louisiana Insurance Code's anti-arbitration provision would not reverse preempt the FAA under the McCarran-Ferguson Act.

Petitioners fail to demonstrate the Fifth Circuit's opinion conflicts with any decision of this Court or any other court. Indeed, Petitioners have alleged no split of authority whatsoever. The Court should deny review for that reason alone.

The Fifth Circuit's opinion also lacks extraordinary factors to justify review. To the contrary, the opinion is unpublished, fact specific to this case, and provides no new or extended legal principles that may set precedent for other cases. Moreover, the Fifth Circuit correctly applied well established precedent in resolving the merits of this case, and its decision comports with decisions from other courts. Therefore, this case does not merit review by this Court.

In sum, Petitioners have failed to carry their burden to show any compelling reasons for the Court to grant the Petition. Because none of the criteria warranting review on a writ of certiorari are present

in the Petition, Respondent respectfully requests the Court deny the Petition.

STATEMENT OF THE CASE

A. Factual Background

Respondent is a fraternal benefit society. Fraternal benefit societies generally are non-profit organizations governed by a representative form of government that are dedicated to fraternal, charitable, and patriotic goals. When a fraternal benefit society such as Respondent issues a person a certificate of insurance, the person becomes a fraternal member of the society and is entitled to the privileges and benefits of society membership.

Respondent issued Petitioner B.M.Y. a certificate of insurance, at which time he became a fraternal member of Respondent. The relationship between Respondent and Petitioner B.M.Y. was governed by a contract containing a broad arbitration clause that requires arbitration "whenever a member . . . of [Respondent] makes a claim for damages, or claims any form of redress for a violation of his or her individual rights."

Petitioner B.M.Y. attended a private youth camp affiliated with Respondent. Participation in the camp was limited exclusively to members of Respondent. While Petitioner B.M.Y. attended the camp, other youths at the camp allegedly sexually assaulted him.

The question in this case is whether the parties' arbitration agreement encompassed Petitioners' negligence claims relating to the alleged assault of Petitioner B.M.Y. by other youths at the camp.

B. Procedural Background

Based on the alleged assault that occurred while Petitioner B.M.Y. attended the youth camp, Petitioners filed a negligence action against Respondent in Louisiana state court (the "State Court Action"). Respondent subsequently filed a Complaint in the United States District Court for the Western District of Louisiana, seeking an order compelling arbitration of the claims raised in the State Court Action.

The District Court held the parties' dispute fell outside the scope of the arbitration agreement, granted Petitioners' motion to dismiss, denied Respondent's motion for a temporary restraining order, and denied Respondent's motion to compel arbitration as moot. Respondent timely appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal to the Fifth Circuit, Petitioners asserted two arguments. For the first time on appeal, Petitioners argued that, under the McCarran-Ferguson Insurance Regulation Act (the "McCarran-Ferguson Act"), 15 U.S.C. §§ 1011 to 1015, the Louisiana Insurance Code's anti-arbitration provision "reverse preempted" the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1 to 16, thereby rendering the arbitration agreement void and unenforceable.

Petitioners also argued their claims in the State Court Action fell outside the scope of the arbitration agreement.[1] At no time did Petitioners challenge the existence of the contract containing the arbitration agreement.

In an unpublished opinion, the Fifth Circuit reversed the District Court. Although Petitioners had failed to raise the argument before the District Court, the Fifth Circuit analyzed whether the Louisiana Insurance Code's anti-arbitration provision applied to fraternal benefit societies such as Respondent. In its analysis, the Fifth Circuit noted the Louisiana Insurance Code expressly exempted fraternal benefit societies from the definition of "insurer" and from the state's general insurance laws, which exemptions indicated the Louisiana Legislature had recognized fraternal benefit societies are unique and should be governed by a different set of rules than ordinary insurance companies. The Fifth Circuit thus found the public policy concerns underpinning the Louisiana Insurance Code's anti-arbitration provision were not strongly implicated in this case. Because refusing to consider Petitioners' reverse preemption argument would not result in a miscarriage of justice, the Fifth Circuit concluded Petitioners had waived

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[1] Petitioners did not argue on appeal to the Fifth Circuit that Respondent somehow accomplished a "backdoor removal" of the State Court Action, an argument that Petitioners raise in the Petition.

the argument by failing to raise it before the District Court.

Holding Petitioners' claims in the State Court Action arguably fell within the broad scope of the arbitration agreement, and given the presumption in favor of arbitration, the Fifth Circuit remanded the case to the District Court with instructions to grant Respondent's motion to compel arbitration and stay the State Court Action pending arbitration. The Fifth Circuit denied Petitioners' Petition for Rehearing En Banc, and this Petition followed.

REASONS FOR DENYING THE PETITION

Review on a writ of certiorari is not a matter of right, but one of judicial discretion. *See* Sup. Ct. R. 10. As such, a petition for a writ of certiorari may be granted only where a petitioner demonstrates "compelling reasons" for such action. *Id.* As discussed below, Petitioners present no compelling reasons for the Court to grant the Petition.

A. Petitioners Fail To Identify Any Conflict

The Court should deny the Petition because Petitioners fail to identify any conflict among the lower courts. "A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts

concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

Petitioners do not contend a conflict exists among the lower courts that this Court should resolve.[2] More specifically, Petitioners do not allege the Fifth Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Absent such a conflict, the Court should deny the Petition.

B. The Fifth Circuit's Decision Was Unpublished And Narrowly Tied To The Unique Facts Of This Case

The decision below was unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than these Petitioners and this Respondent. In addition, as outlined below, this case presents unique facts and circumstances that make it a particularly poor candidate for review.

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[2] Petitioners do not even attempt to allege a split of authority. That is because no such split exists. To the contrary, as outlined in Section D below, the Fifth Circuit's unpublished decision conforms with longstanding principles and precedent, and it is consistent with decisions from other courts.

1. Respondent is a fraternal benefit society, not an insurance company.

Petitioners contend "the essential transaction in this case involved the purchase of a life insurance policy, nothing more and nothing less." (Pet. 13). Petitioners are wrong.

Respondent is not an insurance company. Rather, it is a fraternal benefit society. As the Fifth Circuit recognized, a fraternal benefit society is unlike an insurance company. (Pet. App. 8-9). A fraternal benefit society generally is a non-profit organization conducted solely for the benefit of its members and beneficiaries. As a fraternal benefit society, Respondent operates under a lodge system and a representative form of government, and it aspires to achieve fraternal ideals through family, civic, charitable and patriotic activities. For example, its youth members are granted access to the privileges and benefits of Respondent's youth programs and activities, such as attending youth camps. Indeed, this Court has recognized fraternal benefit societies have a unique status under the law, differentiating them from insurance companies. *See Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925) (recognizing "[t]he act of becoming a member [of a fraternal benefit society] is something more than a contract, it is entering into a complex and abiding relation"); *see also Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 606 (1947) ("The fact of membership in . . . [a] fraternal benefit

society is the controlling and central feature of the relationship.").

Given the unique legal status of fraternal benefit societies and the significant differences between fraternal benefit societies and insurance companies, the Fifth Circuit's unpublished decision in this case has no possible application to cases involving insurance companies. Therefore, review by this Court is particularly unwarranted.

2. The decision below was limited to the specific factual nature of the parties' underlying dispute.

The parties' underlying dispute involved the allegation that while Petitioner B.M.Y. attended youth camp, he was assaulted by other youths at the camp. The Fifth Circuit's decision held only this particular dispute was arbitrable. Indeed, the Fifth Circuit made clear its decision would not apply to every "conceivable dispute between a member and [Respondent]," such as a dispute involving "an automobile collision between a [Respondent] vehicle and a non-[Respondent] vehicle driven by a non-[Respondent] member in which B.M.Y. is a passenger and the presence of which on the occasion in question is wholly unrelated to anything in connection with or arising out of B.M.Y.'s membership [in Respondent]." (Pet. App. 12, n.3). As the decision below was expressly limited to the parties' specific underlying dispute, the Court should deny the Petition.

3. The decision below was dependent on the particular terms of the arbitration agreement at issue.

The arbitration agreement at issue provides in pertinent part as follows:

> **Sec. 2. Resolution of Individual Disputes**
>
> **(a) Purpose.** The purpose of this Section 2 is to provide opportunities for members . . . and the Society to be promptly heard and to seek fair resolution of any disputes regarding any individual rights or individual interests they have or claim to have as members . . . of the Society and without the delay and expense of formal legal proceedings.
>
> **(b) Scope.** This Section 2 shall apply whenever a member . . . makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member. . . . This includes, but is not limited to, disputes involving alleged fraud, misrepresentation, discrimination, denial of civil rights, conspiracy, defamation, or infliction of distress by the Society.

(Pet. App. 30-31). Any determination of the arbitrability of the parties' underlying dispute necessarily is tied to the particular terms of this arbitration agreement and will offer little guidance to courts

dealing with the near infinite array of other arbitration provisions that may be at issue in future cases.

In sum, the narrow scope of the unpublished decision below is based on the unique characteristics of fraternal benefit societies, the specific factual nature of the parties' underlying dispute, and the particular terms of the arbitration agreement at issue. Because this case involves a fact-bound dispute whose resolution is not of importance to anyone other than the immediate parties, the Court should deny the Petition.

C. The Petition Raises A Narrow State Law Issue

Petitioners argue the McCarran-Ferguson Act reverse preempts application of the FAA because the Louisiana Insurance Code's anti-arbitration provision prohibits mandatory arbitration of claims against insurers. (Pet. 16). This argument does not provide a basis for granting certiorari. As noted herein, Petitioners waived the reverse preemption argument by failing to raise it before the District Court. Furthermore, Petitioners' argument would require the Court decide a matter that pertains almost solely to state law.

The McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .

unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). "[T]he McCarran-Ferguson Act provides a narrow exception to [application of the FAA] for state laws governing the insurance industry." *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006). Thus, under the McCarran-Ferguson Act, a state law that specifically regulates the business of insurance may reverse preempt the FAA. *Id.*

The Louisiana Insurance Code prohibits an "insurance contract" from containing a mandatory arbitration clause. La. Rev. Stat. § 22:868. The anti-arbitration provision contained in La. Rev. Stat. § 22:868, however, does not apply to fraternal benefit societies. The Louisiana Insurance Code contains a separate subpart for fraternal benefit societies, and the Louisiana Insurance Code specifically exempts fraternal benefit societies from the definition of an "insurer." La. Rev. Stat. § 22:46(10) ("'Insurer' includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society."). In addition, the Louisiana Insurance Code expressly exempts fraternal benefit societies "from all other provisions of the insurance laws of this state." La. Rev. Stat. § 22:303.

Because no Louisiana court had addressed whether the Louisiana Insurance Code's anti-arbitration provision contained in La. Rev. Stat. § 22:868 applies to fraternal benefit societies such as Respondent, the Fifth Circuit analyzed the Louisiana Legislature's intent in exempting fraternal benefit

societies from Louisiana insurance laws. The Fifth Circuit reasoned, "it appears that the [Louisiana] Legislature drafted La. [Rev. Stat. §] 22:868 with the intent of prohibiting insurance companies from compelling the arbitration of insurance claims made from policy holders." (Pet. App. 9). The Fifth Circuit further reasoned, "[w]hen the Louisiana Legislature drafted a separate subpart of its Insurance Code for fraternal benefit societies and exempted them from the general insurance laws of the state, the Legislature seems to have recognized that those organizations were unique and should be governed by a different set of rules than ordinary insurance companies." (*Id.* at 8-9). The Fifth Circuit then concluded, "the public policy concerns underpinning La. [Rev. Stat. §] 22:868 are not strongly implicated in this case." (*Id.* at 9). Based on this conclusion, the Fifth Circuit determined the McCarran-Ferguson Act would not reverse preempt the FAA, and, accordingly, no miscarriage of justice would result from finding Petitioners had waived the reverse preemption argument by failing to raise it before the District Court. (*Id.*).

Reviewing the Fifth Circuit's decision with regard to Petitioners' reverse preemption argument would require the Court to discern and apply the Louisiana Legislature's intent. The Supreme Court, however, does not have a stake in the correctness of federal decisions that are premised on resolution of underlying state-by-state decisions (in this case, the Louisiana Insurance Code's anti-arbitration

provision). *See Lawrence v. Chater*, 516 U.S. 163, 176-77 (1996) (Rehnquist, C.J., concurring and dissenting in part). The Court, therefore, should deny the Petition.

D. The Fifth Circuit's Decision Was Consistent With Other Authority

Having failed to identify any split of authority or other compelling reasons warranting certiorari, the Petition merely constitutes a challenge to the Fifth Circuit's application of well settled authority to the unique facts of this case. Because, as outlined below, the Fifth Circuit's decision did not depart from any well established law, the Court should deny the Petition.

1. The Fifth Circuit applied well settled law in determining whether the parties' dispute fell within the scope of the arbitration agreement.

The Fifth Circuit applied the correct law in determining the arbitrability of the parties' underlying dispute. Because the Fifth Circuit's decision did not "so far depart[ ] from the accepted and usual course of judicial proceedings," the Court should deny the Petition. Sup. Ct. R. 10(a).

Citing its own precedents, the Fifth Circuit properly stated the correct rules of law concerning arbitrability. First, the court must determine whether the parties agreed to arbitrate the dispute. (Pet. App.

9-10). This first inquiry requires consideration of (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the dispute in question falls within the scope of the arbitration agreement. (*Id.* at 10). Second, the court must consider whether any federal statute or policy renders the claim nonarbitrable. (*Id.*). The Fifth Circuit further recognized the strong federal presumption in favor of arbitration, which requires that where the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court must decide in favor of arbitration. (*Id.* at 10).

Correctly applying its own precedents, the Fifth Circuit held the arbitration agreement at issue was, "at a minimum," susceptible of an interpretation covering the parties' underlying dispute. (Pet. App. 13). In so holding, the Fifth Circuit recognized Petitioner B.M.Y. could not have attended the youth camp if he were not a member of Respondent. (*Id.* at 12). As such, the claims arising from the alleged assault at the camp he attended "solely by virtue of his membership" arose "at least indirectly and not wholly fortuitously," from his membership in Respondent. (*Id.*). Accordingly, it was "at least fairly debatable" that the underlying dispute fell within the bounds of the arbitration agreement at issue, which requires arbitration of claims stemming from membership in Respondent. (*Id.*) (internal quotation omitted).

No reason exists for the Court to review the Fifth Circuit's holding that the parties' underlying dispu

fell within the broad scope of the arbitration agreement at issue. The Fifth Circuit's approach conformed with long-standing principles and precedent. As a result, Petitioners are reduced to arguing the Fifth Circuit should have come to different conclusions based on the particular facts of this case. For example, Petitioners argue the parties' underlying dispute "can be maintained without reference to the life insurance contract" and "does not fall within the parameters" of the arbitration agreement. (Pet. 14-15). Petitioners thus ask the Court to disregard the findings made by the Fifth Circuit and conduct a de novo review of the arbitrability rules to the factual allegations and contract language at issue in this specific case.

Petitioners' fact-based arguments do not merit the Court's review pursuant to Supreme Court Rule 10. As discussed in Section B above, the determination of whether a dispute falls within the scope of an arbitration agreement is a highly factual analysis. The result is driven by the factual nature of the dispute and the particular terms of the arbitration agreement at issue. Depending on the varying factual scenarios and contract language presented by each case, different outcomes will result from application of the rules of law concerning arbitrability.

Taken together, the inherently fact-specific nature of the questions presented and the correctness of the Fifth Circuit's approach make this case a particularly unsuitable candidate for further review. The Court, therefore, should deny the Petition.

2. The decision below did not depart from any well established law in determining whether the arbitration agreement was unenforceable under the McCarran-Ferguson Act.

In determining the Louisiana Insurance Code's anti-arbitration provision would not reverse preempt the FAA under the McCarran-Ferguson Act (and, as a result, no miscarriage of justice would result from finding Petitioners had waived the argument), the Fifth Circuit's decision comports with other courts' decisions addressing whether state anti-arbitration provisions apply to fraternal benefit societies for purposes of reverse preemption under the McCarran-Ferguson Act. *See Thrivent Fin. for Lutherans v. Lakin*, 322 F. Supp. 2d 1017, 1021 (W.D. Mo. 2004) (holding fraternal benefit societies were not subject to Missouri statute prohibiting arbitration of controversies related to insurance, therefore, McCarran-Ferguson Act did not reverse preempt application of FAA); *Aid Ass'n for Lutherans v. Radmer*, No. 99-C-1205, 2001 WL 34388864, at *9 (E.D. Wis. Oct. 31, 2001) ("[T]he FAA is applicable to fraternal benefit societies, notwithstanding the Missouri exception to the enforceability of arbitration clauses pertaining to insurance contracts, because that rule does not expressly state that it applies to fraternal benefit societies."); *Cox v. Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 402 (S.C. Ct. App. 2001) (holding South Carolina's statute that invalidated arbitration provisions in insurance policies "is not applicable to

fraternal benefits associations" because "[t]he general insurance laws of this State do not apply to fraternal benefits associations"); *Woodmen of World Life Ins. Soc'y v. Harris*, 740 So. 2d 362, 366-67 (Ala. 1999) (holding McCarran-Ferguson Act did not prevent FAA from applying to arbitration clause in insurance certificate issued by fraternal benefit society, because statutory invalidation of arbitration agreements was not intended to apply to fraternal benefit societies). Because the decision below is in harmony with decisions of other courts, no basis exists for granting certiorari.

E. Petitioners' So-Called "Backdoor Removal" Argument Is Not Properly Before The Court

Petitioners argue "respondent's complaint to compel arbitration was simply a thinly-veiled attempt to accomplish an untimely 'backdoor removal' of a pending state court action." (Pet. 10). Apparently recognizing they failed to raise this so-called "back-door removal" argument (an argument that neither this Court nor any court of appeals has accepted) before the Fifth Circuit, Petitioners also argue "the Court of Appeals deviated from this Court's established precedent, when it refused to take into account all of the petitioners' arguments advanced in support of the district court's decision." (*Id.* at 9).

In arguing the Fifth Circuit violated the "well-settled principle" that a correct decision below must

be affirmed, even if the lower court relied on the wrong reasons, Petitioners fail to identify "all of the petitioners' arguments" that the Fifth Circuit "refused to take into account." As discussed below, however, none of Petitioners' arguments warrant certiorari.

To the extent Petitioners contend the Fifth Circuit failed to take into account their so-called "backdoor removal" argument, such contention fails because this argument is not properly before the Court. A fundamental rule of practice is that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (issues not raised or addressed by court of appeals ordinarily will not be considered). The Court, therefore, should refuse to consider Petitioners' so-called "backdoor removal" argument on the basis it is an improper and futile attempt to raise an issue not asserted or passed upon by the Fifth Circuit. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) ("Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below . . . it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." (internal citation omitted)).

Furthermore, even if Petitioners' so-called "backdoor removal" argument were properly before the Court (which it is not), this argument still would not warrant certiorari because neither this Court nor any court of appeals ever has recognized this argument. *See Transocean Offshore USA, Inc. v. Catrette*, 239 F. App'x 9, 13 (5th Cir. 2007) ("As for the district court's concern about a constructive removal, this court has found no Supreme Court or court of appeals opinion that even recognizes constructive removal."). Thus, Petitioners' so-called "backdoor removal" argument would not provide a basis for affirming the District Court's decision.

Finally, to the extent Petitioners assert the Fifth Circuit erred in concluding Petitioners had waived the reverse preemption argument by failing to raise it before the District Court, such assertion fails. The Fifth Circuit fully analyzed Petitioners' reverse preemption argument despite Petitioners' failure to raise it before the District Court. Indeed, only after concluding that refusing to consider Petitioners' reverse preemption argument would not result in a miscarriage of justice did the Fifth Circuit hold Petitioners had waived the argument by failing to raise it before the District Court. (Pet. App. 9). The Fifth Circuit thus took into account all of Petitioners' arguments advanced in support of the District Court's decision.

CONCLUSION

Petitioners have failed to establish any compelling reasons for the Court to grant the Petition. Therefore, Respondent respectfully requests the Court deny the Petition.

Dated: October 16, 2009

Respectfully submitted,

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